79-426

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. .....

CHARLES D. MOELLER,

Petitioner,

vs.

STATE OF CONNECTICUT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

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Petitioner Charles D. Moeller respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Connecticut. That judgment affirmed the trial court's denial of petitioner's pre-trial motion to dismiss the information on the grounds of Double Jeopardy, Due Process and collateral estoppel.

Opinions Below

The judgment and opinion of the Supreme Court of Connecticut, one Justice dissenting, entered in this proceeding on June 19, 1979, is reported in 40 *Connecticut Law Journal* No. 51 at page 20, and is reproduced as Appendix "A," *infra*. The unreported opinion of the trial court, denying petitioner's motion to dismiss and dated December 21, 1977, is reproduced as Appendix "B," *infra*.

Statement of Jurisdiction

The decision of the Supreme Court of Connecticut was rendered on June 19, 1979. The jurisdiction of this Court is invoked under 28 United States Code, Section 1257(3).

Questions Presented

1. Does the Double Jeopardy clause or the Fourteenth Amendment Due Process clause permit a State to try petitioner under an information, charging conspiracy to commit arson, brought 15 months after his acquittal in a federal trial over 3 months in length in which he was charged with the same conspriacy to commit the same arson?

2. Can *Bartkus* v. *Illinois,* 359 U.S. 121 (1959), despite severe erosion of the so-called "dual sovereignty" doctrine, continue to provide blanket constitutional permission for a State to try a person acquitted federally for the same offense of conspiracy based on the same conduct, when there is nothing to suggest that the lengthy federal trial resulting in his acquittal did not fully vindicate any proper prosecutorial interest of the State?

3. Does the doctrine of collateral estoppel bar criminal relitigation by a State of facts necessarily adjudicated earlier against the federal government regarding the same crime and conduct, when identical prosecutorial interests of the two "sovereignties" existed and were protected by the first litigation?

Constitutional Provisions Involved

U.S. Const., Amend. V:

> "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

U.S. Const., Amend. XIV:

> ". . . No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Statement of Facts

On May 3, 1977, petitioner was charged by the State with conspiracy to commit arson regarding an industrial fire on March 1, 1975.

More than 15 months prior to this State information, on January 22, 1976, petitioner had been acquitted by a jury in United States District Court of all of the 4 federal charges lodged involving the same fire. (Appendix "C" contains the federal indictment and Judgment of Acquittal). Among the charges upon which petitioner was federally acquitted was an arson conspiracy count under 18 U.S.C. §371. There is no dispute that the State charges now allege the same conspiracy to commit the same act of arson.

The federal trial lasted in excess of 3 months. Had petitioner not been acquitted, he faced a maximum term of 30 years imprisonment on the federal charges; if tried and convicted by the State, a possible maximum of 20 years could result.

The March, 1975 fire was investigated by both federal and State authorities and ten men, including petitioner, were federally indicted in April, 1975. Nine of those were charged later that month by the State. Only petitioner was not then charged by the State, his arrest, as noted, coming more than 15 months after his federal acquittal.

Petitioner's pre-trial motion to dismiss the State prosecution was denied by a judge of the Superior Court. An

appeal to the Supreme Court of Connecticut left said result unchanged, occasioning this petition.

Reasons for Granting the Petition

One pleading a bar to the second of successive federal-state prosecutions for the same offense faces *Bartkus* v. *Illinois*, 359 U.S. 121 (1959). When decided, the Double Jeopardy clause, indeed the Fifth Amendment, did not apply against the States. This fact no longer obtains and the "dual sovereignty" doctrine, secondarily employed in *Bartkus*, has withered to where it currently exists only in this context.

The prosecutorial permission *Bartkus* is too often still deemed to grant is overly broad for the "sovereign" purposes it sought to effect, permitting various fundamentally egregious abuses in its name.

The Double Jeopardy clause and Due Process should bar a State trial of one thoroughly tried and acquitted by a federal jury where nothing suggests any "sovereign" interest in the second prosecution not vindicated in the first and where the sentences either forum could impose are not significantly disparate.

The only recent decision arguably of the dual sovereignty-successive prosecution stripe, suggested, in dicta that *Bartkus* retained validity. *United States* v. *Wheeler*, —— U.S. ——, 55 L.Ed.2d 303 (1978). However, the result reached did not require employment of *Bartkus*, for petitioner had not challenged it, claiming only that the *same* sovereign improperly prosecuted second.

Federal prosecution generally declines the permission to prosecute successively under *Abbate* v. *United States*, 359 U.S. 187 (1959), the twin of *Bartkus*; *Petite* v. *United*

States, 361 U.S. 529 (1960). Almost half the States, legislatively or judicially, decline that of *Bartkus* itself. Logic and the fact that the protections here invoked were fashioned to protect persons, not "sovereignties," compel consideration of narrowing the abuses available under *Bartkus*.

It is submitted that these issues raise important questions of federal law and criminal justice, deserving definitive resolution, especially since pre-trial appeals regarding Double Jeopardy are available (from District Courts) under *Abney* v. *United States*, 431 U.S. 651 (1977) (and, by analogy are likely from State rulings, as here).

I.

Bartkus v. *Illinois* and Its Dual Sovereignty Doctrine Have Been So Eroded as to Be Without Valid Force.

Bartkus v. *Illinois*, 359 U.S. 121 (1959), in a 5-4 decision, held that an acquittal on a prior federal charge of bank robbery was not a bar to a successive Illinois State prosecution for the same act. The opinion of the bare majority had dual bases, one of which has been specifically and totally destroyed, while the other has been so eroded as to deserve the same fate.

In the majority opinion, Justice Frankfurter rejected the defense of the Double Jeopardy clause first because of the Fifth Amendment itself was not binding, through lack of incorporation into the Fourteenth Amendment's Due Process clause, against the States. The foundation for said rejection was *Palko* v. *Connecticut*, 302 U.S. 319 (1937), holding that a State prosecution was not prohibited by the Fourteenth Amendment's Due Process clause unless it was

"repugnant to the conscience of mankind." [1] The second basis for the *Bartkus* holding was the concept of "dual sovereignty" under which two policy justifications were offered. First, if State prosecutions were barred by prior federal trials, State law enforcement would be hampered. Second, it was stated that the refusal to declare a constitutional bar would permit the states to develop their own "rational and just body of criminal law in the prosecution of its citizens." *Bartkus*, 359 U.S. at 137-38.

The first rationale of *Bartkus*, the inapplicability of the Double Jeopardy clause of the Fifth Amendment, fell with *Benton* v. *Maryland*, 395 U.S. 784 (1969). The Court expressly overruled *Palko*, the strong lynchpin of *Bartkus*:

> " . . . [W]e today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment. Insofar as it is inconsistent with this holding, *Palko* v. *Connecticut* is overruled."

Benton, 395 U.S. at 794.

Of that "fundamental ideal," *Benton*, quoting from *Green* v. *United States*, 355 U.S. 184 (1957) said:

> "[T]he underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty." [2]

[1] *Palko*, 302 U.S. at 323, quoted in *Bartkus*, 359 U.S. at 127.

The lack of viable content remaining in *Bartkus* can be seen by scrutinizing the other basis for its holding, the "dual sovereignty" doctrine. There had been life to dual sovereignty in areas other than the power to successively prosecute and in those areas the rights of the individual have since been held to prevail over what were clearly notions of dual sovereignty, and the abuses formerly permitted in its name.

Prior to 1960, the federal government was free to use evidence illegally seized by State officials, so long as federal authorities did not participate in the illegal activity. *Lustig* v. *United States*, 338 U.S. 74 (1949). The dual sovereignty doctrine inherent in this "silver patter" concept was effectively abolished in *Elkins* v. *United States*, 364 U.S. 206 (1960), where the Court prohibited the introduction of illegally seized State evidence in federal courts. " . . . To the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer." *Id.* at 215. Additional damage was done to the principle when *Mapp* v. *Ohio*, 367 U.S. 643 (1961) covered the reverse order of events. Evidence seized illegally by federal officials was ruled inadmissible in state prosecutions.

Similarly, notions of dual sovereignty once held sway under the Fifth Amendment's self-incrimination clause. A State court was free to use testimony obtained by the fed-

[2] *Id.* at 796. Justice Brennan has recently elaborated on the prospect of a second trial enhancing the risk of convicting the innocent, pointing to prosecutorial opportunity to assess weaknesses in the first trial and the frequent occurrence that "prosecution witnesses change their testimony, not always subtly, at second trials." *United States* v. *Scott*, 437 U.S. 82, 105 (1978) (dissenting opinion, n. 4).

eral government under a grant of federal immunity. *United States* v. *Murdock*, 284 U.S. 141 (1931). The federal government was likewise free to introduce evidence obtained from testimony given before a State grand jury under a grant of State immunity. *Feldman* v. *United States*, 322 U.S. 487 (1944).

However, in *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964), the Court, noting the rejection in *Elkins, supra,* of the dual sovereignty doctrine as a reason to allow illegally State-seized evidence in federal courts, ended any prospect for the doctrine of dual sovereignty to justify incrimination in one jurisdiction through immunized compelled testimony in the other. The *Murphy* Court noted that the constitutional policies involved, written to protect the individual, "are defeated when a witness 'can be whipsawed into incriminating himself under both state and federal law even though' the constitutional privilege against self-incrimination is applicable to each." *Murphy, supra,* at 55, quoting Justice Black's dissent in *Knapp* v. *Schweitzer*, 357 U.S. 371, 385 (1958). The same, discredited "whipsaw" remains running smoothly if *Bartkus* continues to permit a second trial by another jurisdiction when each would be prohibited by the Double Jeopardy clause from so acting alone.

The parallels between that which *Elkins* and *Murphy* barred and what petitioner here seeks to enjoin are compelling. Those cases rather clearly destroy the doctrinal foundation of *Bartkus*, by allowing defendants in one jurisdiction to assert their constitutional rights in decrying actions by authority in the other jurisdiction, without having those rights overridden by the abstract concept of dual sovereignty. Both *Elkins* and *Murphy*, unlike *Bartkus*, emphasized the effect upon the individual as did Justice Black's dissent in *Bartkus*. Further, there was expressed

a recognition that the two jurisdictions are hardly separate and independent "in our age of 'cooperative federalism,' where the Federal and State Governments are waging a united front against many types of criminal activity." *Murphy*, 378 U.S. at 56.

The *Murphy* Court held that its decision in *Malloy* v. *Hogan*, 378 U.S. 1 (1964), applying the privilege against self-incrimination to the States, compelled reconsideration of the "established rule" that the constitutional privilege did not protect a witness in one jurisdiction against the compulsion to give testimony that could be used to convict him in another jurisdiction. *Murphy*, 378 U.S. at 57. The same consideration obtains here. The Court's decision in *Benton, supra,* enforcing the Double Jeopardy guaranty against the States, necessitates a similar review of the established rule that a federal trial resulting in conviction or acquittal raises no bar to subsequent State trial for the same offense or conduct. As the Court recognized in *Ashe* v. *Swenson*, 397 U.S. 436 (1970), ". . . *Benton* . . . puts the [Double Jeopardy issue] . . . in a perspective quite different from that in which the issues were perceived" when only considerations of Fourteenth Amendment due process were thought pertinent. *Id.* at 442.

By 1966, Justices Harlan and Stewart, part of the *Bartkus* majority, were of the opinion that *Murphy* had destroyed the notion of dual sovereignty: "In addition, this Court has recently extended the Fifth Amendment to the states, (citing *Malloy*), and abolished the 'two sovereignties' rule (citing *Murphy*) . . . ." *Stevens* v. *Marks*, 383 U.S. 234, 250 (1966) (Justice Harlan, whom Justice Stewart joined, concurring in part and dissenting in part). Similarly, regarding the effect of *Benton* on the doctrine, Justice Douglas commented as a Circuit Justice, in 1975 that: "*Benton* may cast doubt upon the continuing vitality

of *Bartkus* v. *Illinois*, ..." *Smith* v. *United States*, 423 U.S. 1303, 1307 (1975).

Also, *Waller* v. *Florida*, 397 U.S. 387 (1970), saw the Court unanimously reject the State's *Bartkus*-based claim that it was permitted to successively prosecute after a municipal conviction for the same conduct, despite that Florida's argument was constitutional doctrine in at least 21 states. *Id.* at 391, n. 3.

It seems the Court has, since *Bartkus*, remedied those *intra*-trial abuses brought to it regarding evidence (*Elkins*) and testimony (*Murphy*) whereby two sovereigns might have been able to accomplish in concert what neither could do alone. Now the Court is asked to close the circle in response to a constitutional right that addresses the impropriety of the trial itself. Here, as in the post-*Bartkus* cases, the abstraction of federalism and its rather short-lived progeny, dual sovereignty, should not be permitted to totally override a constitutional protection fashioned for the individual.

II.

The Permission *Bartkus* Is Deemed to Extend Is Taken Beyond That Which Is Necessary to Effect the Stated Purpose.

Of the rationale behind *Bartkus*, only what Justice Frankfurter called "a practical justification" (359 U.S. at 136) has not directly suffered either total reversal or debillitating erosion.[3]

[3] As noted, *Malloy* and *Benton* reversed holdings that the Fifth Amendment and its Double Jeopardy clause, respectively, did not apply to the States. Then the *Bartkus* majority turned to the Fourteenth Amendment Due Process clause and its "repugnant to the conscience of mankind" standard and the federalism-based doctrine of dual sovereignty *then* prevailed over the claimed individual rights. The erosion marked by *Elkins*, *Murphy* and *Waller* has been noted. It seems fair to ask today the constitutional question whether dual sovereignty should continue to prevail in a balancing exercise when the more permissive Fourteenth Amendment standard is no longer the only principle against which it is to be weighed.

It is petitioner's contention that the blanket permission *Bartkus* extends to the States goes, or has been deemed to go far beyond that which is necessary to meet the concern the Court voiced in its "practical justification" reference which addressed *Screws* v. *United States*, 325 U.S. 91 (1945) as follows:

> "[D]efendants were tried and convicted in a federal court under federal statutes with maximum sentences of a year and two years respectively. But the state crime there involved was a capital offense. Were the federal prosecution of a comparatively minor offense to prevent state prosecution of so grave an infraction of state law, the result would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines. It would be in derogation of our federal system to displace the reserved power of States over state offenses by reason of prosecution of minor federal offenses by federal authorities beyond the control of the States."

Bartkus, 359 U.S. at 137.

The "untoward deprivation" a State would suffer if barred from prosecuting a "grave . . . infraction" after federal action on a "comparatively minor offense" is simply not "a practical justification" for a prosecution where, as here, petitioner faced a 30 year maximum aggregate sentence federally and would face if tried by the State, a 20 year maximum. The federal trial here, in excess

of three months, was not the kind of nominal, regulatory action which the Court in *Bartkus* feared could bar pursuit of valid State interests.

Nor has it been suggested that the federal prosecution herein sought to vindicate governmental interests of a different nature than that of the State. Indeed, such a suggestion, if belatedly made, would be weakened by the identity of offense charged.

The dual factors of significant sentence disparity and a State showing that it seeks to vindicate a different sovereign interest are the only necessary ingredients to a test that would fairly accommodate the interest of the individual whom the provisions involved are to protect and the residue of *Bartkus,* concerned with State law enforcement.[4]

While not of constitutional effect on this proceeding, it is significant to note that the federal prosecutorial power almost immediately responded in the negative to the permission of *Abbate* v. *United States, supra,* the twin of *Bartkus,* dealing with the reverse order of successive prosecutions. The Attorney General, in a policy announcement of April 6, 1959, acknowledged the rule's potential for causing "considerable hardship" and the need for "self-restraint." The directive disallowed federal prosecutions after State prosecutions for offenses arising out of the same transaction unless the reasons therefor were "most compelling" and then only after special permission had

[4] Two of the State supreme courts who declined the ostensible *carte blanche* of *Bartkus,* fashioned a Due Process rule embracing the two elements requisite to the accommodation suggested in the text. *Commonwealth* v. *Mills,* 447 Pa. 163, 286 A.2d 638 (1971); *People* v. *Cooper,* 398 Mich. 450, 247 N.W.2d 866 (1976). *See, also, Commonwealth* v. *Cepulonis,* 373 N.E.2d 1136 (1978), wherein the Supreme Judicial Court of Massachusetts adopted a rule involving sentence disparity and the "same evidence" test.

been given by an Assistant Attorney General. Department of Justice Press Release, April 6, 1959; *Rinaldi* v. *United States,* 434 U.S. 22 (1977). This Court has also been unequivocally informed by the Solicitor General that the government has strictly adhered to this policy since 1959. *Rinaldi, supra,* at 30, n. 16.

The policy refuses prosecution except when "necessary to advance compelling interests of federal law enforcement." *Id.* at 28. It seems logical, indeed beyond dispute, that the same kinds of considerations petitioner here has suggested ought be weighed as a constitutional matter (interest of the sovereign subsequently proceeding and sentence disparity) are behind the government's voluntary policy, and one cannot dispute the fundamental fairness therein. "The overriding purpose of the . . . policy is to protect the individual from any unfairness associated with needless multiple prosecutions." *Id.* at 31.

Of constitutional moment here, regarding petitioner's Due Process claim, is that the Court has, as recently as 1977, in *Rinaldi,* acknowledged *needless* multiple prosecutions as unfair, and the "need" which would justify them can only be based upon factors here absent—federally nominal sentence exposure or a different State governmental interest.

III.

The Doctrine of Collateral Estoppel Should Also Be Held to Bar This Prosecution.

In *Ashe* v. *Swenson,* 397 U.S. 436 (1970), the Court held that the doctrine of collateral estoppel was embodied in the Fifth Amendment's guaranty against Double Jeopardy and that under *Benton* was applicable against the states.

The doctrine was thusly described: "It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe,* 397 U.S. at 443.

The doctrine, being first developed civilly, had been clearly applicable to federal criminal situations, since *United States* v. *Oppenheimer,* 242 U.S. 85 (1916), in which Justice Holmes said: "It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt." *Id.* at 87, quoted in *Ashe* at 443.

It was also made clear in *Ashe* that "the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Ashe, supra,* at 444.

The case at bar would be directly governed by *Ashe* if it were not for the fact that there are ostensibly different parties on the prosecutorial side. However, the parties to the lawsuit need not be identical in order that the doctrine be applied with "realism and rationality." For example, in *Ashe,* Chief Justice Burger noted that the doctrine "ordinarily applies to parties on each side of the litigation

who *have the same interest as* or who are identical with the parties in the initial litigation." *Ashe,* 397 U.S. at 464 (dissenting opinion) (emphasis added).

The notion of identity of parties is also called "privity" of parties in much of the civil discourse on collateral estoppel and res judicata and the *Restatement, Judgments* (1942), in §83, after noting the obvious truth that one in privity is bound, notes in the comment: "The word "privy" includes those . . . whose interests are represented by a party to the action . . . ."

Once it is noted that the doctrine (a) constitutionally bars relitigation of the same ultimate fact and (b) is properly to be invoked against parties with the same interest in the litigation of that fact or facts, its meaning for this case is clear. The State's interest was identical to and was protected by the federal government in a trial over three months long in which the issue of defendant's conspiring as to this fire was resolved against it.

The claim is brought full circle when one accepts, as he must, that the Double Jeopardy protection is intended as a fundamental protection for the individual rather than a prosecution seeking an historically abhorred second bite at the same apple.

CONCLUSION

Petitioner respectfully submits that the important question of federal law, to wit, whether the *Bartkus* doctrine, despite reversal and/or erosion of its various rationale, remains intact and permits this State prosecution for the same offense despite prior federal acquittal, should be resolved.

As Mr. Justice Frankfurter had occasion to say:

> "When it appears that a challenged doctrine has been uncritically accepted as a matter of course by the inertia of repetition—has just 'grow'd' like Topsy—The Court owes it to the demands of reason, on which judicial law-making power ultimately rests for its authority, to examine its foundations and validity in order appropriately to assess claims for its extension." *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, 551 (dissenting opinion).

For the foregoing reasons, petitioner prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

THOMAS L. NADEAU
Attorney for Petitioner

Certificate of Service

This is to certify that three (3) copies of the foregoing Petition For Writ of Certiorari were mailed, postage prepaid, on this 17th day of September, 1979, to Counsel for Respondent, State of Connecticut: Donald A. Browne, Esquire, State's Attorney, 1061 Main Street, Bridgeport, Connecticut.

.....

THOMAS L. NADEAU

Appendices

APPENDIX "A"

Opinion of Supreme Court of Connecticut

SUPREME COURT

MARCH TERM, 1979

STATE OF CONNECTICUT v. CHARLES MOELLER

COTTER, C. J., LOISELLE BOGDANSKI, LONGO and PETERS, JS.

Argued March 14—decision released June 19, 1979

Information charging the defendant with the crimes of conspiracy to commit arson in the first degree and conspiracy to commit arson in the second degree, brought to the Superior Court in Fairfield County where the court, *I. Levine, J.*, denied the defendant's motion to dismiss the information, from which the defendant appealed to this court. *No error.*

Thomas L. Nadeau, with whom, on the brief, was *Theodore I. Koskoff,* for the appellant (defendant).

Donald A. Browne, state's attorney, for the appellee (state).

LONGO, J. The single issue presented by this appeal is whether the trial court erred in denying the defendant's motion to dismiss,thus overruling the defendant's claim that a state prosecution, following a federal court jury acquittal regarding essentially the same alleged criminal conduct, would violate certain of the defendant's rights secured by the state and federal constitutions.

We briefly recite those facts necessary to a resolution of this issue: On the evening of March 1, 1975, a fire totally destroyed a large manufacturing facility in Shel-

ton, Connecticut, known as Plant No. 4 of the Sponge Rubber Products Company. This incident resulted in an extensive investigative effort by both federal and state authorities which led to a federal indictment and the arrest of ten individuals, including the defendant Moeller. Subsequently, a lengthy federal trial resulted in the conviction of various of the federal defendants.[1] On January 22, 1976, the defendant Moeller was acquitted by the federal jury of all of the four charges lodged against him, and on January 27, 1976, a formal judgment of acquittal was rendered by the United States District Court (Newman, J.) as to the defendant. Among the charges upon which the defendant was acquitted was an arson conspiracy count under 18 U.S.C. §§ 371, 1952 and 2.

Thereafter, on May 3, 1977, the defendant was charged in the Superior Court, in a two-count information, with conspiracy to commit arson in the first and second degrees, in violation of §§ 53a-48, 53a-111 and 53a-112 of the General Statutes, for his alleged participation in the Shelton Sponge Rubber Products Company fire. The state's application for a bench warrant, the supporting affidavit, and the subsequently filed information make clear that the same conspiracy as charged in the federal indictment is involved in the pending state prosecution. The defendant pleaded not guilty to the information. On May 25, 1977, the defendant filed a motion to dismiss the information based upon the "double jeopardy" provision of the fifth amendment to the United States constitution,[2] the due process and equal protection clauses of the fourteenth

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[1] See *United States* v. *Bubar*, 567 F.2d 192, 196 (2d Cir. 1977).

[2] "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. Const., amend. V.

amendment to the constitution, and the due process clause of article first, § 8, of the Connecticut constitution. On December 21, 1977, the trial court denied the defendant's motion. The defendant has appealed to this court from the denial of his motion to dismiss.

Both the defendant and the state have assisted the court in focusing sharply upon the issue to be resolved; the parties have candidly argued and thoroughly researched the legal principles that must, of necessity, illuminate and guide our decision. The defendant mounts an attack from both constitutional and statutory quarters, arguing that the trial court erred in denying his motion to dismiss, principally because the cases upon which the court relied, *Bartkus* v. *Illinois*, 359 U.S. 121, 79 S. Ct. 676, 3 L. Ed. 2d 684 (1959), and *Abbate* v. *United States*, 359 U.S. 187, 79 S. Ct. 666, 3 L. Ed. 2d 729 (1959), and their numerous progeny, establishing an exception to the rule against double jeopardy commonly referred to as the "doctrine of dual sovereignty," have been so enfeebled and eroded as to lack any binding force. Additionally, it is argued that, consistent with the intention of various legislative enactments and court decisions of other states emphasizing the "individual protection" which the double jeopardy clause was meant to foster, a successive state prosecution following a federal court acquittal is barred. The defendant finally argues that the doctrine of collateral estoppel, as constitutionally embodied in the double jeopardy clause, bars the relitigation by the state of the same operative facts upon which the defendant had previously been acquitted by a federal jury. The state responds that the established law on the issue presented is unequivocal and clear in holding that the same act may constitute a viola-

tion of both federal and state laws, and neither a conviction nor an acquittal in federal or state court bars a subsequent prosecution in the other court system arising from the same transaction or event. We agree.

In *Bartkus* v. *Illinois,* 359 U.S. 121, 79 S. Ct. 676, 3 L. Ed. 2d 684 (1959), and *Abbate* v. *United States,* 359 U.S. 187, 79 S. Ct. 666, 3 L. Ed. 2d 729 (1959), the United States Supreme Court reaffirmed the well-established principle that a federal prosecution does not bar a subsequent state prosecution of the same person for the same acts, and a state prosecution does not bar a federal one.[3] The basis for the court's decision, establishing what has been termed the "dual sovereignty" concept; see *United States* v. *Wheeler,* 435 U.S. 313, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978); was that prosecutions under the laws of separate sovereigns do not, in the language of the fifth amendment, "subject [the defendant] for the same offense to be twice put in jeopardy": "An offence, in its legal signification, means the transgression of a law. . . . Every citizen of the United States is also a citizen of a State or territory. He

[3] Although the problems arising from concurrent federal and state criminal jurisdiction had been noted earlier; see *Houston* v. *Moore,* 18 U.S. (5 Wheat.), 1, 5 L. Ed. 19 (1820); the court did not clearly address the issue until *Fox* v. *Ohio,* 46 U.S. (5 How.) 410, 12 L. Ed. 213 (1847); *United States* v. *Marigold,* 50 U.S. (9 How.) 560, 13 L. Ed. 257 (1850); and *Moore* v. *Illinois,* 55 U.S. (14 How.), 13, 14 L. Ed. 306 (1852), in the mid-nineteenth century. Those cases upheld the power of states and the federal government to make the same act criminal; in each case the possibility of consecutive state and federal prosecutions was raised as an objection to concurrent jurisdiction, and was rejected by the court on the ground that such multiple prosecutions, if they occurred, would not constitute double jeopardy. The first case in which actual multiple prosecutions were upheld was *United States* v. *Lanza,* 260 U.S. 377, 43 S. Ct. 141, 67 L. Ed. 314 (1922), involving a prosecution for violation of the Volstead Act, c. 85, 41 Stat. 305, after a conviction for criminal violation of liquor laws of the state of Washington.

may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both. . . . That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offenses, for each of which he is justly punishable." *Moore* v. *Illinois,* 55 U.S. (14 How.) 13, 19-20, 14 L. Ed. 306 (1852).

The court in Abbate found further support for the "dual sovereignty" concept by noting the "undesirable consequences" that woud inhere in imposing a double jeopardy bar upon state-federal or federal-state prosecutions. Prosecution by one sovereign for a minor offense might bar prosecution by the other for a much graver one, and the court clearly took the position that a federal prosecutor has no authority to bargain away a state's power to enforce its criminal laws. See also *United States* v. *Wheeler, supra,* 318.

Finally, *Bartkus* and *Abbate,* although not weathering the years without criticism,[4] rest on the basic structure of our federal system, in which the states and the national government are separate political communities. State and federal governments "[derive] power from different sources," each from the organic law that established it. *United States* v. *Lanza,* 260 U.S. 377, 382, 43 S. Ct. 141, 67 L. Ed. 314 (1922). Each has the power, inherent in any

[4] See, e.g., Brant, "Overruling *Bartkus* and *Abbate:* A New Standard for Double Jeopardy," 11 Washburn L.J. 188 (1972); Recent Developments, 18 Vill. L. Rev. 491 (1973); Recent Decisions, 12 Duq. L. Rev. 365 (1973); Comment, "Successive Prosecutions by Two Sovereigns After *Benton* v. *Maryland,*" 66 Nw. U.L. Rev. 248 (1971); Recent Cases, 39 Cinn. L. Rev. 799 (1970).

sovereign, independently to determine what shall be an offense against its authority and to punish such offenses, and in doing so each "is exercising its own sovereignty, not that of the other." Ibid. "And while the States, as well as the Federal Government, are subject to the overriding requirements of the Federal Constitution, and the Supremacy Clause gives Congress within its sphere the power to enact laws superseding conflicting laws of the States, this degree of federal control over the exercise of state governmental power does not detract from the fact that it is a State's own sovereignty which is the origin of its power." *United States* v. *Wheeler, supra,* 320.

II

The defendant must acknowledge that his claim of double jeopardy, arising from the pending state prosecution, is, as a matter of federal constitutional law, foreclosed under the rationale of *Bartkus* and *Abbate.* It is not correct to claim, however, as does the defendant, that these cases no longer represent the United States Supreme Court's view of the concept of "dual sovereignty" or that these cases have lost their viability concerning successive prosecutions under the double jeopardy clause. The continued validity and propriety of the "dual sovereignty" concept was recognized and affirmed by the unanimous decision of the Supreme Court in *United States* v. *Wheeler, supra,* and has been continuously reaffirmed by the decisions of the United States Courts of Appeals. *Wheeler,* holding that the double jeopardy clause did not bar the prosecution of an Indian in a federal court when he had previously been convicted in a tribal court of a lesser included offense arising out of the same incident, discusses *Bartkus* and *Abbate* at length, clearly regarding them as still correctly stating the law, and unequivocally reaffirms the dual sovereignty doctrine

which prevents the imposition of the double jeopardy bar.

Moreover, almost every federal circuit has rejected claims identical to those raised by the defendant Moeller, thereby permitting successive state-federal or federal-state prosecutions. See *United States* v. *Martin,* 574 F.2d 1359 (5th Cir. 1978); *United States* v. *Frumento,* 563 F.2d 1083 (3d Cir. 1977); *United States* v. *Cordova,* 537 F.2d 1073 (9th Cir. 1976); *United States* v. *James,* 532 F.2d 1161 (7th Cir.; 1976) *United States* v. *Villano,* 529 F.2d 1046 (10th Cir. 1976); *United States* v. *Johnson,* 516 F.2d 209 (8th Cir. 1975); *Martin* v. *Rose,* 481 F.2d 658 (6th Cir. 1973); *United States* v. *Barone,* 467 F.2d 247 (2d Cir. 1972); *United States* v. *Smith,* 446 F.2d 200 (4th Cir. 1971); *United States* v. *Regan,* 273 F. 727 (1st Cir. 1921).[5]

Notwithstanding this univerally accepted principle of federal law, the defendant argues that the principle allowing successive prosecutions has been eroded by three subsequent decisions of the United States Supreme Court, which, it is claimed, suggest that the attitude of the court may have changed since *Bartkus* and *Abbate.* Those decisions are *Benton* v. *Maryland,* 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969); *Waller* v. *Florida,* 397 U.S. 387, 90 S. Ct. 1184, 25 L. Ed. 2d 435 (1970); and *Ashe* v. *Swenson,* 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). We cannot agree with the defendant's interpretation of those cases.

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[5] The substantial majority of state courts also adhere to this view. See, e.g., *People* v. *Hines,* 572 P.2d 467 (Colo. 1977); *State* v. *Rogers,* 90 N.M. 604, 566 P.2d 1142 (1977); *State* v. *Forbes,* 348 So. 2d 983 (La. 1977); *Crane* v. *State,* 555 P.2d 845 (Nev. 1976); *Stathes* v. *State,* 29 Md. App. 474, 349 A.2d 254 (1975); *State* v. *Turley,* 518 S.W.2d 207 (Mo. App. 1974); *Klein* v. *Murtagh,* 44 App. Div. 2d 465, 355 N.Y.S.2d 622 (1974); *People* v. *Belcher,* 11 Cal. 3d 91, 520 P.2d 385 (1974); *State* v. *Cooper,* 54 N.J. 330, 255 A.2d 232 (1969); *State* v. *Castonguay,* 240 A.2d 747 (Me. 1968).

Appendix "A"

In *Benton* the Supreme Court's firmly established that the application of the fifth amendment guarantee against double jeopardy is enforceable against the states through the fourteenth amendment, but the case has no further application to the case at bar. In *Waller* the court held that a single sovereign, there the state, could not maintain two separate prosecutions for an offense and an included offense. Here, we have independent sovereigns prosecuting for different offenses, each offense being peculiar to the separate sovereign. In *Ashe*, upon a theory of collateral estoppel, it was held that a single sovereign cannot prosecute for separate offenses occurring in a single event where the result of the first prosecution collaterally and undeniably established the innocence of the accused on the second charge. This again, is not our case.[6]

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[6] The defendant argues that the state, pursuant to *Ashe* v. *Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970), is collaterally estopped from "relitigating" the facts upon which he was acquitted in federal court. We disagree. Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the *same parties* in any future law suit." (Emphasis added.) *Ashe* v. *Swenson*, supra, 443; see *Slattery* v. *Maykut*, Conn. (40 Conn. L.J., No. 12, pp. 4, 7) (1978). The application of collateral estoppel thus requires an identity of parties in the prior and subsequent litigation. In this case, the federal government is neither the same as nor in privity with the state of Connecticut. In such circumstances, the state is not collaterally estopped from maintaining a prosecution against the defendant. *Turley* v. *Wyrick*, 554 F.2d 840, 842 (8th Cir. 1977); *United States* v. *Johnson*, 516 F.2d 209, 211 (8th Cir. 1975); *Martin* v. *Rose*, 481 F.2d 658, 660 (6th Cir.), cert. denied, 414 U.S. 876, 94 S. Ct. 86, 38 L. Ed. 2d 121 (1973); *Ferina* v. *United States*, 340 F.2d 837, 839 (8th Cir.), cert. denied, 381 U.S. 902, 85 S. Ct. 1446, 14 L. Ed. 2d 284 (1965); *United States* v. *Wapnick*, 315 F.2d 96 (2d Cir. 1963); *Rios* v. *United States*, 256 F.2d 173 (9th Cir. 1958); *State* v *Smith*, 359 So. 2d 160, 163 (La. 1978); *State* v. *West*, 260 N.W.2d 215, 219 (S.D. 1977); *State* v. *Rogers*, 90 N.M. 604, 607, 566 P.2d 1142 (1977); *Commonwealth* v. *Studebaker*, 362 A.2d 336 (Pa. Super. 1976); *Klein* v. *Murtagh*, 44 App. Div. 2d 465, 469, 355 N.Y.S.2d 622 (1974).

Appendix "A"

We thus decline the defendant's invitation to construe *Benton*, *Waller* and *Ashe* as cases anticipatory of a rule prohibiting all but a single prosecution regardless of considerations concerning different laws and the rights of separate sovereigns. The courts that have considered the precise claim made by the defendant concerning the effect of these cases on *Bartkus* and *Abbate* have specifically rejected the argument. *Hutul* v. *United States*, 582 F.2d 1155, 1157 (7th Cir. 1978); *United States* v. *Wallace*, 578 F.2d 735 (8th Cir. 1978); *United States* v. *Johnson*, 516 F.2d 209 (8th Cir. 1975); *Martin* v. *Rose*, 481 F.2d 658 (6th Cir. 1973); *United States* v. *Crosson*, 462 F.2d 96 (9th Cir. 1972); *United States* v. *Synnes*, 438 F.2d 764 (8th Cir. 1971); *State* v. *Fletcher*, 26 Ohio St. 2d 221, 224, 271 N.E.2d 567 (1971); *Breedlove* v. *State*, 470 S.W.2d 880, 882 (Tex. Crim. App. 1971); *Bankston* v. *State*, 236 So. 2d 757, 760 (Miss. 1970); *State ex rel. Cullen* v. *Ceci*, 45 Wis. 2d 432, 457, 173 N.W.2d 175 (1970). A compilation of additional cases in accord with those cited may be found in annot., 18 A.L.R. Fed. 393.

Furthermore, the defendant's argument that the United States Supreme Court may have "changed its mind" concerning *Bartkus* and *Abbate* is, at the least, not aided by the fact that that court has consistently denied review, most recently on February 20, 1979, without a single dissent, in appeals involving precisely the same multifaceted attack made by the present defendant challenging the continuing authority of *Bartkus* and *Abbate*. See *Hutul* v. *United States*, 582 F.2d 1155 (7th Cir.), cert. denied, —— U.S. ——, 98 S. Ct. 1222, —— L. Ed. 2d —— (1979) (leaving intact ruling that no double jeopardy violation inheres in successive prosecutions); *MacDonald* v. *United States*, 585 F.2d 1211 (4th Cir. 1978), cert. denied, —— U.S. ——,

99 S. Ct. 1504, L. Ed. 2d —— (1979) (leaving intact ruling that collateral estoppel no bar to successive prosecution); *Parker* v. *United States,* 582 F.2d 953 (5th Cir. 1978), cert. denied, —— U.S. ——, 99 S. Ct. 1424, —— L. Ed. 2d —— (1979) (leaving intact ruling that collateral estoppel no bar to successive prosecution).[7]

III

The defendant finally assigns significant emphasis to the decisions of some state courts,[8] and a number of legislative enactments, that have, pursuant to particular state constitutions or by statute, limited or rejected the dual sovereignty concept.[9] We are not persuaded to joint those states in rejecting the clear language of the United States Supreme Court in *Bartkus* and *Abbate,* and the almost uni-

[7] See also *Millhouse* v. *United States,* 563 F.2d 1083 (3d Cir. 1977), cert. denied, 434 U.S. 1072, 98 S. Ct. 1256, 55 L. Ed. 2d 775 (1978); *Sills* v. *United States,* 563 F.2d 1083 (3d Cir. 1977), cert. denied, 434 U.S. 1072, 98 S. Ct. 1258, 55 L. Ed. 2d 776 (1978); *United States* v. *Kerrigan,* 514 F.2d 35 (9th Cir. 1975), cert. denied, 423 U.S. 924, 96 S. Ct. 266, 46 L. Ed. 2d 249 (1975); *United States* v. *Worth,* 505 F.2d 1206 (10th Cir. 1974), cert. denied, 420 U.S. 964, 95 S. Ct. 1358, 43 L. Ed. 2d 443 (1975); *United States* v. *Burke,* 495 F.2d 1226 (5th Cir. 1974), cert. denied, 419 U.S. 1079, 95 S. Ct. 667, 42 L. Ed. 2d 673 (1974); *Martin* v. *Rose,* 481 F.2d 658 (6th Cir. 1973), cert. denied, 414 U.S. 876, 94 S. Ct. 86, 38 L. Ed. 2d 121 (1973).

[8] *State* v. *Hogg,* —— N.H., ——, 385 A.2d 844 (1978); *People* v. *Cooper,* 398 Mich. 450, 247 N.W.2d 866 (1976); *Commonwealth* v. *Mills,* 447 Pa. 163, 286 A.2d 638 (1971); cf. *Commonwealth* v. *Cepulonis,* —— Mass. ——, 373 N.E.2d 1136 (1978).

[9] Alaska, Arizona, Arkansas, California, Delaware, Georgia, Hawaii, Illinois, Indiana, Kansas, Minnesota, Montana, New York, North Dakota, Oklahoma, Pennsylvania, Utah, Virginia, and Washington have such legislation. See citations collected at American Law Institute Double Jeopardy, 126-27 (1935), and Model Penal Code § 1.11, pp. 60-61, comment (Tent. Draft No. 5, 1956).

versal acceptance of those authorities in the cases we have cited in this opinion. Our constitution, first, has no double jeopardy clause, and although we have indicated that the prohibition against double jeopardy is implicit in our common law; *State* v. *Woodruff,* 2 Day 504, 507 (1807); we have never held that, under the circumstances of this case, a state prosecution is barred. We refrain from doing so in the present case. A contrary rule could result in an unseemly race between the federal and state authorities to obtain early jurisdiction, thereby eventuating in a frustration of either the national or state policy concerning law enforcement. To agree with the defendant could create an "undesirable result"; *Abbate* v. *United States,* supra, 195; "the result would be a shocking and untoward deprivation of the historic right and obligation of the states to maintain peace and order within their confines." *Bartkus* v. *Illinois,* supra, 137.

The dual sovereignty concept of *Bartkus* and *Abbate* is based upon the practical necessity of permitting the state and federal governments to enforce laws which they enact in their respective fields of operation. Those decisions, giving sensible recognition to the practicalities of our constitutional form of government, reject the premise that successive prosecutions are merely a judicial nuance, and compellingly find that the necessities of the governments in enforcing their laws for the benefit of *all* citizens are of greater importance than the undesirability of an occasional imposition of two trials on an individual. We agree.

There is no error.

In this opinion Cotter, C. J., Loiselle and Bogdanski, Js., concurred.

PETERS, J. (dissenting). While I agree with my colleagues that *Bartkus* v. *Illinois*, 359 U.S. 121, 79 S. Ct. 676, 3 L. Ed. 2d 684 (1959), and *Abbate* v. *United States*, 359 U.S. 187, 79 S. Ct. 666, 3 L. Ed. 2d 729 (1959), establish a rule of dual sovereignty that has continued to have vitality, I disagree about the implications of dual sovereignty for this court.

Dual sovereignty is one example of the recognition of the principle of federalism. *Bartkus* and *Abbate* hold no more than that the fourteenth and the fifth amendments to the United States constitution do not forbid one sovereign the right to reprosecute a criminal defendant because of his prior involvement with the other sovereign. Nothing in those cases compels, or even legitimates, automatic reprosecution as a matter of state law. That the rule of dual sovereignty is permissive rather than mandatory is clear from *Bartkus*, the case more directly relevant because it too involved state reprosecution after federal acquitatal. *Bartkus* stated (pp. 138-39): "[T]hese problems are ones with which the States are obviously more competent to deal than is this Court. Furthermore, the rules resulting will intimately affect the efforts of a State to develop a rational and just body of criminal law in the protection of its citizens. We ought not to utilize the Fourteenth Amendment to interfere with this development."

It is furthermore clear that the formal absence of a provision in our constitution expressly forbidding double jeopardy is not a barrier to consideration of the claim raised by the defendant. The prohibition against double jeopardy is, as my colleagues acknowledge, implicit in the common law, and our cases have so held. *State* v. *Langley*, 156 Conn. 598, 600-601, 244 A.2d 366 (1968), cert. denied, 393 U.S. 1069, 89 S. Ct. 726, 21 L. Ed. 2d 712 (1969); *Kohlfuss* v. *Warden*, 149 Conn. 692, 695, 183 A.2d 626, cert.

denied, 371 U.S. 928, 83 S. Ct. 298, 9 L. Ed. 2d 235 (1962). This case comes to us as a matter of first impression as to which there are no binding precedents until today.

The facts of the case before us present a compelling argument for invocation of the prohibition against double jeopardy. The defendant is charged in this state with the same conspiracy for which he was indicted and acquitted in federal court. The incident that gave rise to both prosecutions was, from the outset, investigated jointly by federal and state authorities. There is no discernible prosecutorial interest that was not fully vindicated in the original federal trial. The state has made no affirmative showing why this defendant should twice be forced to run the gauntlet of criminal prosecution.

I believe this court should adopt the view of the Model Penal Code § 1.10 (Proposed Official Draft, 1962) barring reprosecution after acquittal in another jurisdiction unless "the offense of which the defendant was formerly . . . acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other and the law defining each of such offenses is intended to prevent a substantially differetnt harm or evil . . . ." This position has recently been accepted by a number of state courts; *Commonwealth* v. *Cepulonis*, Mass. , 373 N.E.2d 1136, 1141-42 (1978); *People* v. *Cooper*, 398 Mich. 450, 460-61, 247 N.W.2d 866 (1976); *State* v. *Hogg*, N.H. , 385 A.2d 844, 846-47 (1978); *Commonwealth* v. *Mills*, 447 Pa. 163, 169-72, 286 A.2d 638 (1971).[1] It is

[1] The Final Report of the National Commission on Reform of Federal Criminal Laws ("The Brown Commission") in 1971 recommended the enactment of federal legislation to modify *Bartkus* and *Abbate*. See Report on Proposed Federal Criminal Code, 34 Business Lawyer 725, 730 and 753 (January 1979). The American Bar Association's Study Committee urges amendment of S. 1437, the proposed Criminal Code Reform Act of 1978, to incorporate the proposals of the Brown Commission. Id., 754.

unarguable that the instant reprosecution cannot meet the test proposed by the Model Penal Code.

My colleagues fear that a limitation on state authority to reprosecute could result in an unseemly race between the federal and the state authorities to obtain early jurisdiction. It seems to me at least as likely that the state and federal authorities will, as in the case before us, cooperate to assure two functionally identical opportunities to try a defendant more than once for one and the same offense. Unless there is a substantial independent state interest to be vindicated, scarce state prosecutorial resources might better be allocated to trying new crimes rather than to retrying old ones.

I would, therefore, find error on the part of the trial court.

APPENDIX "B"

Opinion of Trial Court

SUPERIOR COURT

COUNTY OF FAIRFIELD

No. 25,131

December 21, 1977

STATE OF CONNECTICUT

vs.

CHARLES D. MOELLER

MEMORANDUM ON DEFENDANT'S MOTION TO DISMISS INFORMATION BASED ON DOUBLE JEOPARDY

The defendant has moved to dismiss the information pursuant to the double jeopardy clause of the Fifth Amendment and the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and Article First, Section 8, of the Connecticut Constitution. His motion alleges that the defendant was indicted and tried in the United States District Court in New Haven, Connecticut, and that the federal crimes alleged and tried arose out of the same transaction and occurrence as provides the basis for this action. He further alleges that the jury returned a verdict of not guilty on the charges submitted to it after other charges had been dismissed by the court or withdrawn by the government. He further alleges that the crimes charged by the federal and state governments do not reflect that the interests of the federal and state governments are substantially different nor the penalties widely disparate, nor the statutes

substantively different, and that there is no "reason to believe that the federal government could not have been trusted to fully vindicate the interest of the State government."

The landmark cases in the area of double jeopardy, i.e., successive prosecutions by the federal and state governments, are *Bartkus* v. *Illinois,* 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684, and *Abbate* v. *United States,* 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed.2d 729, which held that the due process clause of the Fourteenth Amendment does not prohibit prosecutions by both sovereignties for federal and state crimes arising out of the same transaction or occurrence and that they exercise concurrent jurisdiction over the same offense. This doctrine has been followed in many cited decisions. *Goode* v. *McCune,* 543 F.2d 751, 753 (1976); *United States* v. *Cordova,* 537 F.2d 1073, 1075 (1976); *United States* v. *James,* 532 F.2d 1161, 1165 (1976); *United States* v. *Villano,* 529 F.2d 1046, 1061 (1976); *United States* v. *Jones,* 527 F.2d 817, 822 (1975); *Sappington* v. *United States,* 523 F.2d 858, 860 (1975); *Speed* v. *United States,* 518 F.2d 75, 76 (1975); *United States* v. *Johnson,* 516 F.2d 209, 212 (1975); *United States* v. *Kerrigan,* 514 F.2d 35, 37 (1975), cert. den. 423 U.S. 924, 96 S.Ct. 266, 46 L.Ed.2d 249; *United States* v. *Worth,* 505 F.2d 1206, 1210 (1974), cert. den. 420 U.S. 964, 95 S.Ct. 1358, 43 L.Ed.2d 443; *United States* v. *Watts,* 505 F.2d 951, 953 (1974); *United States* v. *Ackerson,* 502 F.2d 300, 302 (1974); *United States* v. *Delay,* 500 F.2d 1361, 1362 (1974); *Brinlee* v. *United States,* 496 F.2d 351, 353 (1974); *United States* v. *Burke,* 495 F.2d 1226, 1235 (1974), cert. den. 419 U.S. 1079, 95 S.Ct. 667, 42 L.Ed.2d 673; *United States* v. *Hayles,* 492 F.2d125, 126 (1974); *United States* v. *Vaughan, Jr.,* 491 F.2d 1096, 1097 (1974); *People* v. *Belcher,* 113 Cal.Rep. 1, 520 P.2d

385, 389 (1974); *United States* v. *Smaldone,* 485 F.2d 1333, 1343 (1973); *Martin* v. *Rose,* 481 F.2d658, 659 (1973), cert. den. 414 U.S. 876, 94 S.Ct. 86, 38 L.Ed.2d 121; *United States* v. *Addington,* 471 F.2d560, 566 (1973); *United States* v. *Jackson,* 470 F.2d 684, 689 (1972) cert. den. 412 U.S. 951, 93 S.Ct. 3019, 37 L.Ed.2d 1004; *United States* v. *Barone,* 467 F.2d 247, 250 (1972); *United States* v. *Crosson,* 462 F.2d 96, 103 (1972); *United States ex rel. Hill* v. *United States,* 452 F.2d 664, 665 (1971); *Birch* v. *United States,* 451 F.2d 165, 167 (1971); *United States* v. *Smith,* 446 F.2d 200, 202 (1971); *United States* v. *Synnes,* 438 F.2d 764, 773 (1971); *United States* v. *Hutul,* 416 F.2d 607, 626 (1970), cert. den. 396 U.S. 1012, 90 S.Ct. 573, 24 L.Ed.2d 504; *DeMaria* v. *Jones,* 416 F.Supp. 291, 301 (1976); *Turley* v. *Wyrick,* 415 F.Supp. 87, 88 (1976); *Lovell* v. *Arnold,* 391 F.Supp. 1047, 1048 (1975); *Crane* v. *State* (Nev.), 555 P.2d 845, 846 (1976); *State* v. *Turley,* (Mo.) 518 S.W.2d 207, 209 (1975); *Sathes* v. *State,* 29 Md.App. 474, 349 A.2d 254 (1975); *Office of Disciplinary Counsel* v. *Campbell,* (Penn.) 345 A.2d 616, 620 (1975); *Klein* v. *Murtagh,* 355 N.Y.S.2d 622, 626, 44 A.D.2d 465 (1974); *Bell* v. *State,* 22 Md.App. 496, 323 A.2d 677 (1974), cert. den. 421 U.S. 1003, 95 S.Ct. 2405, 44 L.Ed. 2d 671; *State* v. *Glover* (Mo.), 500 S.W.2d 271 (1973); *State* v. *Krell,* 125 N.J.Super. 457, 311 A.2d 399, 401 (1973); *State* v. *Pope,* 186 Neb. 489, 184 N.W.2d 395, 396 (1971); *Nance* v. *State,* 123 Ga.App. 410, 181 S.E.2d 295, 296 (1971); *Breedlove* v. *State,* (Tex. Cr.App.), 470 S.W.2d 880, 882 (1971), cert. den. 405 U.S. 1074, 92 S.Ct. 1512, 31 L.Ed.2d 808; *State* v. *Fletcher,* 26 Ohio St. 2d 551, 271 N.E.2d 567, 569 (1971), cert. den. 404 U.S. 1024, 92 S.Ct. 699, 30 L.Ed.2d 675; *State ex rel. Cullen* v. *Ceci,* 45 Wis.2d 432, 173 N.W.2d 175, 187 (1970); *Coffman* v. *State* (Tenn.), 466 S.W.2d 241, 243 (1970), cert. den. 404 U.S. 1019, 92 S.Ct. 689, 30 L.Ed.2d

668; *Bankston* v. *State* (Miss.), 236 So.2d 757, 760 (1970); *State* v. *Cooper,* 54 N.J. 330, 255 A.2d 232, 236 (1969); *State* v. *Castonguay* (Me.), 240 A.2d 747, 750 (1968); *Lem* v. *Commonwealth* (Ky.), 419 S.W.2d 759, 761 (1967).

The defendant's argument is based on the law stated in *Benton* v. *Maryland,* 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707; and *Ashe* v. *Swenson,* 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469. Essentially his argument is that these decisions, as well as many other cases cited by him, have weakened *Bartkus* to the point where it should no longer be followed. He points to no case which overrules *Bartkus.* Sustaining the viability of *Bartkus* in cases making the same claims as the defendant makes here are the following: *United States* v. *Villano,* 529 F.2d 1046, 1061 (1976); *United States* v. *Johnson,* 516 F.2d 209, 212 (1975); *United States* v. *Hayles,* 492 F.2d 125, 126 (1974); *United States* v. *Vaughan, Jr.,* 491 F.2d 1096, 1097 (1974); *United States* v. *Smaldone,* 485 F.2d 1333, 1343 (1973); *Martin* v. *Rose,* 481 F.2d 658, 659 (1973), cert. den. 414 U.S. 876, 94 S.Ct. 86, 38 L.Ed.2d 121; *United States* v. *Crosson,* 462 F.2d 96, 103 (1972); *Birch* v. *United States,* 451 F.2d 165, 167 (1971); *United States* v. *Synnes,* 438 F.2d 764, 773 (1971); *Turley* v. *Wyrick,* 415 F.Supp. 87, 88 (1976); *Klein* v. *Murtagh,* 355 N.Y.S.2d 622, 626, 44 A.D.2d 465 (1974); *State* v. *Fletcher,* 26 Ohio St.2d 551, 271 N.E.2d 567, 569 (1971), cert. den. 404 U.S. 1024, 92 S.Ct. 699, 30 L.Ed.2d 675; *Breedlove* v. *State* (Tex. Cr. App.), 470 S.W.2d 880, 882 (1971), cert. den. 405 U.S. 1074, 92 S.Ct. 1512, 31 L.Ed.2d 808; *State ex rel. Cullen* v. *Ceci,* 485 Wis.2d 432, 173 N.W.2d 175, 187 (1970); *Bankston* v. *State* (Miss.), 236 So.2d 757, 760 (1970).

Reference is made to the decision of Saden, J., in *State* v. *Tiche,* 33 Conn. Sup. 51, 360 A.2d 135. In that case, in

which the issue of double jeopardy was raised, is the same situation existing here; transaction and events were the same as those in the instant case and there having been a previous conviction in the federal court.

"Nevertheless, the law in the area of successive federal-state prosecutions for the same kind of offense is clear. The doctrine of dual sovereignty allows successive federal-state prosecutions for the same offense. Abbate v. United States, 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed.2d 729; Bartkus v. Illinois, supra; and United States v. Lanza, 260 U.S. 377, 43 S.Ct. 141, 67 L.Ed. 314. The court in Lanza stated (p. 382, 43 S.Ct. p. 142): 'We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.' In Bartkus, the petitioner was acquitted of robbery charges in a federal court and retried and convicted on that same robbery charge and the same evidence by a state court. The court, citing a large body of impressive precedent which showed that courts had for years refused to bar a second trial for the same offense, even when there had been a prior trial by another government, reaffirmed the dual sovereignty doctrine and proclaimed reprosecution by a state government after trial by the federal government not to be in violation of the double jeopardy provisions of the United States constitution.

"Cases such as Ashe v. Swenson, supra, n.1; Waller v. Florida, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435; and Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707, which followed Bartkus, were thought by some to have impugned the doctrine of dual sovereignty, but all of them involved successive state court prosecutions in the same

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state, and subsequent cases do not view them as rejecting the concept of dual sovereignty. Both the federal courts (United States v. Ackerson, 502 F.2d 300, 302 [8th Cir.]; United States v. Delay, 500 F.2d 1360, 1362 [8th Cir.]; United States v. Hayles, 492 F.2d 125, 126 [5th Cir.]; United States v. Smaldone, 485 F.2d 1333 [10th Cir.]; Martin v. Rose, 481 F.2d 658, 659 [6th Cir.], cert. denied, 414 U.S. 876, 94 S.Ct. 86, 38 L.Ed.2d 121; United States v. Jackson, 470 F.2d 684, 689 [5th Cir.]; United States v. Barone, 467 F.2d 247, 250 [2d Cir.]; United States v. Crosson, 462 F.2d 96, 103 [9th Cir.]; and the state courts (Bell v. State, 22 Md.App. 496, 510, 323 A.2d 677, cert. denied, 421 U.S. 1003, 95 S.Ct. 2405, 44 L.Ed.2d 672; State v. Turley, 518 S.W.2d 207, 210 [Mo. App.], cert. denied, 421 U.S. 966, 95 S.Ct. 1956, 44 L.Ed.2d 454; State v. Fletcher, 26 Ohio St. 2d 221, 271 N.E.2d 567, cert. denied, 404 U.S. 1024, 92 S.Ct. 699, 30 L.Ed.2d 675; Commonwealth v. Mills, 447 Pa. 163, 286 A.2d 638) have made this manifest. In addition, the United States Supreme Court has denied certiorari in all of the subsequent cases which have sought to reverse the dual sovereignty concept, e.g., Martin v. Rose, supra.

"Bartkus v. Illinois, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684, is still the law and successive prosecutions by the federal and state governments for the same offense do not constitute double jeopardy. Commonwealth v. Mills, supra. Thus, even if we are dealing here with the same offense, the State of Connecticut is not barred from pursuing its rights to try the defendant." State v. Tiche, ante, at 136-7.

The defendant's motion to dismiss is denied.

Irving Levine, J.

Filed December 21, 1977.

APPENDIX "C"

Federal Indictment and Judgment of Acquittal

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

Criminal No. N-75-59

UNITED STATES OF AMERICA,

v.

CHARLES D. MOELLER, DAVID N. DUBAR, aka Noble David Bubar, PETER BETRES, RONALD D. BETRES, ALBERT R. COFFEY, ANTHONY A. JUST, DENNIS C. TICHE, MICHAEL J. TICHE, JOHN W. SHAW and DONALD L. CONNORS.

The Grand Jury Charges:

COUNT ONE

That commencing on or about the month of December, 1974, the precise date being to the Grand Jury unknown, and continuously thereafter up to and including the date of the filing of this indictment, in the District of Connecticut and elsewhere, CHARLES D. MOELLER, DAVID N. BUBAR, PETER BETRES, RONALD D. BETRES, ALBERT R. COFFEY, ANTHONY A. JUST, DENNIS C. TICHE, MICHAEL J. TICHE, JOHN W. SHAW, and DONALD L. CONNORS, defndants herein, wilfully and knowingly did combine, conspire, confederate, and agree together and with each other and with diverse other persons to the Grand Jury unknown, to commit the following offense against the United States of America:

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To travel in interstate commerce between Butler, Pittsburgh, and Boyers, all in the Commonwealth of Pennsylvania; and New York in the State of New York; and Shelton, Derby, Danbury and New Haven in the State of Connecticut, with the intent to promote, manage, carry on and facilitate the promotion, management and carrying on of an unlawful activity, to wit: the commission of arson in violation of Section 53(a)—113, Connecticut General Statutes (Rev. 1958 as Amended), and did perform acts to promote, manage, carry on and facilitate the promotion, management and carrying on of such unlawful activity in violation of Title 18, United States Code, Section 1952 and 2.

OVERT ACTS

In furtherance of the conspiracy, and to effect the objects thereof, the defendants did commit, among others, the following overt acts:

a. In late December, 1974, or early January, 1975, DAVID N. BUBAR and PETER BETRES traveled from New York, New York, to Shelton, Connecticut.

b. On or about February 17, 1975, DENNIS C. TICHE traveled from Boyers, Pennsylvania, to Shelton, Connecticut, and ANTHONY A. JUST traveled from New Kensington, Pennsylvania, to Shelton, Connecticut.

c. On or about February 20, 1975, DENNIS C. TICHE and JOHN W. SHAW arranged to purchase and did purchase and acquire drums for the purpose of transporting explosives and an accelerant from Boyers, Pennsylvania to Shelton, Connecticut.

d. On or about February 20 and February 27, 1975, DENNIS C. TICHE and JOHN W. SHAW purchased or obtained gasoline to be used as an accelerant.

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e. On or before February 27, 1975, DENNIS C. TICHE purchased and obtained dynamite, detonating or primer cord and blasting caps for use in igniting the accelerant.

f. On or about February 27, 1975, DENNIS C. TICHE and others arranged to rent and obtained the use of an Avis Rental truck.

g. On or about February 27, 1975, DENNIS C. TICHE, MICHAEL J. TICHE and JOHN W. SHAW prepared and loaded the explosives and accelerant aboard the Avis truck for transportation from Boyers, Pennsylvania, to Shelton, Connecticut.

h. On or about February 27, 1975, PETER BETRES arranged to have DONALD L. CONNORS drive the Avis truck loaded with the explosives and accelerant from Boyers, Pennsylvania, to Shelton, Connecticut.

i. On or about February 28, 1975, DONALD L. CONNORS drove the Avis truck from Boyers, Pennsylvania, to Shelton, Connecticut.

j. On or about February 28, 1975, DONALD L. CONNORS made a telephone call from the State of New York to the State of Connecticut, in the course of which he received instructions as to the precise destination and the route he was to follow thereto.

k. On or about February 28, 1975, PETER BETRES traveled from Butler, Pennsylvania, to Shelton, Connecticut, and from Shelton, Connecticut, to New York, New York.

l. On or about February 28, 1975, DENNIS C. TICHE, MICHAEL J. TICHE, and JOHN W. SHAW traveled from Pittsburgh, Pennsylvania, to New York, New York and then to New Haven, Connecticut, and thence to Shelton, Connecticut.

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m. On or about February 28, 1975, ANTHONY A. JUST, ALBERT R. COFFEY and RONALD D. BETRES traveled from Pennsylvania to Danbury, Connecticut, and thence to Shelton, Connecticut.

n. On or about March 1, 1975, DONALD L. CONNORS delivered approximately twenty-four (24) drums of gasoline and two (2) drums of explosives to Plant 4 of Sponge Rubber Products Company, Shelton, Connecticut.

o. On or about March 1, 1975, DAVID N. BUBAR arranged and facilitated the delivery of gasoline and explosives into Plant 4, Sponge Rubber Products Company, Shelton, Connecticut, and the entry thereinto of DENNIS C. TICHE, MICHAEL J. TICHE and JOHN W. SHAW.

p. On or about March 1, 1975, DAVID N. BUBAR, DENNIS C. TICHE, MICHAEL J. TICHE, JOHN W. SHAW, ANTHONY A. JUST, RONALD D. BETRES and ALBERT R. COFFEY were in Plant 4, Sponge Rubber Products Company, Shelton, Connecticut.

q. On or about March 1, 1975, RONALD D. BETRES, ALBERT R. COFFEY and ANTHONY A. JUST abducted and removed from Plant 4, Sponge Rubber Products Company, Shelton, Connecticut, three persons employed thereat, to wit: ROY RANNO, ALFRED C. HANLEY and ROBERT V. DE JOY.

r. On or about February 10, 1975, February 28, 1975 and March 19, 1975, CHARLES D. MOELLER directed and authorized the payment of the sums of Twenty Thousand ($20,000) Dollars and Fifteen Thousand ($15,000) Dollars, and Fifteen Thousand ($15,000) Dollars, moneys of Ohio Decorative Products, Inc., Grand Sheet Metal Company and/or

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Sponge Rubber Products Company, to Southern Supply Company, delivery of which was made to DAVID N. BUBAR.

s. On or about February 11, 1975, DAVID N. BUBAR paid and delivered to PETER BETRES a sum of money.

t. On or about February 28, 1975, PETER BETRES delivered a sum of money to DENNIS C. TICHE.

u. On or about March 1, 1975, DENNIS C. TICHE delivered a sum of money to MICHAEL J. TICHE and JOHN W. SHAW.

All in violation of Title 18, United States Code, Section 371.

COUNT TWO

On or about February 28, 1975, in the District of Connecticut and elsewhere, DAVID N. BUBAR, PETER BETRES, DENNIS C. TICHE, MICHAEL J. TICHE, JOHN W. SHAW, RONALD D. BETRES, ALBERT R. COFFEY, ANTHONY A. JUST, DONALD L. CONNORS and CHARLES D. MOELLER did travel and cause travel in interstate commerce between Butler, Boyers, and Pittsburgh, all in the Commonwealth of Pennsylvania, and New York in the State of New York, and Shelton, Derby, Danbury and New Haven, in the State of Connecticut, with the intent to promote, manage, carry on and facilitate the promotion, management and carrying on of an unlawful activity, to wit: the commission of arson in violation of Section 53-(a)-113, Connecticut General Statutes (Rev. 1958, as Amended), and did perform acts to promote, manage, carry on and facilitate the promotion, management and carrying on of such unlawful activity,

In violation of Title 18, United States Code, Section 1952 and 2.

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COUNT THREE

On or about the 28th day of February, 1975, in the District of Connecticut and elsewhere, DAVID N. BUBAR, PETER BETRES, DENNIS C. TICHE, MICHAEL J. TICHE, JOHN W. SHAW, ALBERT R. COFFEY, ANTHONY A. JUST, DONALD L. CONNORS and CHARLES D. MOELLER did transport in interstate commerce, from Boyers in the Commonwealth of Pennsylvania to Shelton in the State of Connecticut, explosives, that is, dynamite, detonating or primer cord and blasting caps, knowing and intending that the said explosives would be used unlawfully to damage and destroy a building on Canal Street, in Shelton, Connecticut, known as Plant No. 4, Sponge Rubber Products Company,

In violation of Title 18, United States Code, Section 844(d) and 2.

COUNT FOUR

On or about March 1, 1975, in the District of Connecticut and elsewhere, CHARLES D. MOELLER, DAVID N. BUBAR, PETER BETRES, RONALD D. BETRES, ALBERT R. COFFEY, ANTHONY A. JUST, DENNIS C. TICHE, MICHAEL J. TICHE, JOHN W. SHAW and DONALD L. CONNORS, did wilfully and knowingly receive and possess a firearm, as defined in Title 26, United States Code, Section 5845(a)(8), and Title 26, United States Code, Section 5845(f)(1)(A), to wit: a destructive device consisting of dynamite, detonating or primer load, blasting caps and gasoline, which firearm was not registered to any of them in the National Firearms Registration and Transfer Record, as required by Chapter 53, Title 26, United States Code,

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In violation of Title 26, United States Code, Section 5861(d) and 5871, and Title 18, United States Code, Section 2.

/s/ Guy P. Nocera
FOREMAN

/s/ Peter C. Dorsey
PETER C. DORSEY
UNITED STATES ATTORNEY

/s/ Peter A. Clark
PETER A. CLARK
ASSISTANT UNITED STATES ATTORNEY

/s/ William F. Dow III
WILLIAM F. DOW, III
ASSISTANT UNITED STATES ATTORNEY

Appendix "C"

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

CRIMINAL N-75-59

UNITED STATES OF AMERICA

vs.

CHARLES D. MOELLER

JUDGMENT OF ACQUITTAL

A twelve-count Indictment having been returned by the Grand Jury on May 8, 1975 and Counts 1, 2, 3, 4, 5, 8, 9, 10, 11 and 12 having been against the above-named defendant, and the said defendant having entered a plea of not guilty as to above counts charging him with violation of Title 18 United States Code, Sections 371, 1952.2, 844(d), 2 844(i), 2, 844(h), 2, 1962(c), 2 and Title 26 United States Code, Sections 5861(f), 5871, 2, 5861(i), 5871, 2, 5861(c), 5871, 2, 5861(d), 5871 and 2, and thereafter said defendant having been brought on for trial before the undersigned and a jury, and the Court having dismissed Counts 4, 5, 8, 9, 10 and 11, and a retyped four-count indictment, containing Counts 1, 2, 3 and 12, renumbered as Counts 1, 2, 3 and 4, charging him with violation of Title 18 United States Code, Sections 371, 1952, 2, 844(d), 2 and Title 26 United States Code, Sections 5861(d) and 5871, 2, having been filed, and the jury having returned verdicts of not guilty on each of the four counts on January 22, 1976, to said defendant,

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IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the defendant, CHARLES D. MOELLER, stand acquitted of the charges contained in the four-count Criminal Indictment.

Dated at New Haven, Connecticut this 26th day of January, 1976.

.....

United States District Judge